

**Letter of Findings: 01-20190485P  
Individual Income Tax  
For The Tax Year 2017**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Individual demonstrated that the late payment of tax was due in part to a retroactive change in the law. Once this change occurred, Individual paid the outstanding liability. Therefore, he exercised the diligence expected of a reasonable taxpayer, and the penalty will be waived. The Department is not permitted to waive interest in this circumstance.

### ISSUE

#### **I. Tax Administration—Penalty and interest.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 897 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty and interest.

### STATEMENT OF FACTS

Taxpayer is an individual receiving pass-through income from a New Jersey S-Corp whose wholly-owned subsidiary operates in several states, including Indiana. In 2017, the S-Corp recognized a deemed repatriated dividend under IRC § 965 from a different subsidiary operating outside the United States. Taxpayer did not believe this income was subject to tax in Indiana and therefore did not pay tax on it. In May of 2018, after the due date for the 2017 tax payment, HEA 1316-2018(ss) was enacted and signed into law. This bill included deemed dividend income under IRC § 965 in Indiana's definition of adjusted gross income. The Indiana Department of Revenue ("Department") offered additional guidance in July of 2018 via Information Bulletin #116. This Bulletin clarified that Indiana adjusted gross income would be calculated before the federal deduction in IRC §965(c). In October of 2018, Taxpayer made a payment to account for income from this deemed repatriated dividend. When the payment was submitted, the Department imposed a penalty and interest on the late payment. Taxpayer protested the assessment of penalty and interest. After filing the protest, Taxpayer also filed amended returns requesting a refund for tax on the deemed repatriated dividend. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

#### **I. Tax Administration—Penalty and interest.**

### DISCUSSION

Taxpayer protests the imposition of penalty and interest associated with the partial late payment of 2017 individual income tax. Taxpayer notes that the Department's guidance on the treatment of IRC § 965 deemed repatriated dividends was not issued until after Taxpayer's bill was past due. In fact, the Legislature did not include these dividends in the calculation of Indiana Adjusted Gross Income for the tax year until after the taxes were due. By paying tax on the repatriated deemed dividends a few months after Indiana issued its guidance, Taxpayer believes that he acted in a reasonable manner and that waiver of penalty is appropriate.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the [D]epartment's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the

person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 897 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision shall be entitled to deference.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;**
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

**(Emphasis added).**

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when a taxpayer establishes that its failure to pay a tax was due to reasonable cause and not due to negligence. [45 IAC 15-11-2](#)(c). The taxpayer must demonstrate that it exercised ordinary business care in carrying out or failing to carry out a duty giving rise to the penalty. Reasonable cause is fact sensitive and will vary based on the facts of each individual case.

In this instance, Taxpayer has demonstrated that his actions were reasonable. Taxpayer could not have anticipated that Indiana would retroactively amend its statutes to change how repatriated deemed dividends affect adjusted gross income. Once these changes were made and the Department issued guidance on the effect of the federal deduction in IRC §965(c), Taxpayer paid the additional tax due. Because Taxpayer acted with reasonable care, the Department waives the assessed penalty. However, the Department is not permitted to waive interest under IC § 6-8.1-10-1(e).

## FINDING

Taxpayer's protest of the negligence penalty is sustained. Taxpayer's protest of the imposition of interest is denied.

August 22, 2019

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An [html](#) version of this document.